P L D 1952 Lahore 502

Before Muhammad Munir, C. J. and Rahman, J.

LAL KHAN-Convict-Appellant

versus

CROWN -Respondent

Criminal Appeal No. 46 of 1952, decided on 18th July 1952, from the order of F. H. Shah. Sessions Judge, Rawalpindi, dated the 7th December 1951.

Penal Code (XLV of 1860)------

-----S. 84-Plea of insanity-Burden of Proof-Creation of mere doubt as to existence or otherwise of circumstances bringing the case within exception not enough -- Unsoundness of mind must be affirmatively established within meaning of section-Evidence Act (I of 1872), Ss. 4, 105.

Per Rahman, J.-Where the facts established, prima ,facie make out a case justifying the conviction of a person, of an offence, unless certain other facts are proved, bringing the offence within one of the general or special exceptions of the Penal Code, the mere creation of a doubt on the part of the accused as to the existence or otherwise of those special circum stances asserted on his behalf would not suffice. In such a con tingency, the necessary facts could be said to be neither "prov ed" nor "disproved", and hence they would fall within the de finition of "not proved" given in the Act. In view of the clear language of section 105, it would be anomalous to hold that, although the exceptional circumstances were not proved, yet the accused was entitled to have the benefit of a doubt arising on the whole case. This would imply the contradictory finding that certain circumstances were "not proved" and yet their existence should in some sense be regarded as sufficiently pro bable to extend their benefit to the accused person. The test in such cases would be the probability or otherwise of the existence or otherwise of the relevant circumstances. Of course there may be cases in which the defence taken may cast a doubt on the existence of the requisite intention or mens rea which proves a necessary ingredient of the offence. In such cases it is conceivable that the accused may succeed in secur ing an acquittal on the strength of a reasonable doubt created on that point. But where the circumstances of the defence plea do not affect the ingredients of the offence established by the prosecution evidence e.g., where the right of private defence or circumstances of grave and sudden provocation are pleaded, no such question can possibly arise and the accused must "prove" his defence plea within the meaning of the Act.

The standard of proof required of an accused person may, however, not be the same as would rest ordinarily on the prosecution in all criminal cases. This is so. not because the Act provides for different standards of judgment in so many words, but because the proof is made to depend upon the subjective conviction of the "prudent -man". Such a conviction would be conditioned by the circumstances of each individual case. The standard of proof would, therefore, vary, but it could not be held that a fact must be held to be "proved" although a doubt exists as to its existence or otherwise. Such a view would be unsustainable having regard to the definitions of "proved", ``disproved" and "not proved" in the Act.

The suggestion of a mere reasonable possibility of the existence of exceptional circumstances would not exonerate the accused in all cases, On the other hand, circumstances should be "proved" in the sense of that word as defined in the Act, with

reference to the opinion of the "prudent man" and the rule of reasonable doubt can be successfully invoked in a certain category of cases only.

Per Muhammad Munir, C. J.-If the killing and the re quisite intention or knowledge are proved or admitted, but the plea taken is that of insanity, the evidence in proof of the plea will not be directed against any ingredient of the offence of murder but will seek to establish that some other independent fact which is not a part of the offence of murder existed which made the act, which was prima facie, murder, cease to be murder. It is this principle on which the English cases and the provisions of our Evidence Act can be reconciled and which appears to me to be a correct deduction from the general principle and the relevant provisions of the Evidence Act. That being the position, the Court will have to see in each particular case whether the doubt created by the evidence produced by the accused is confined to something special pleaded by him or whether the doubt also extends to a neces sary ingredient of the offence charged .... A prima facie proof of accident will be sufficient to entitle the accused to an acquittal on the charge of murder because ex hypothesi such prima facie evidence makes the evidence relating to intention and knowledge which is an ingredient of the offence of murder doubtful. This, however, is not the case where grave and sudden provocation or the right of private defence is relied on by the accused in order to show that what is otherwise murder is not so because of the existence of certain other facts which do not enter into the definition of the offence of murder. In the case of such exceptions, I am of the view that evidence produced by the defence which merely throws a doubt on the applicability or otherwise of the exception will not be suffi cient to discharge the onus that lies on the accused to prove that his case comes within the exception. A contrary view would have the effect of requiring the prosecution to disprove the exception, which is plainly opposed to the terms o1 section 105 of the Evidence Act.

Emperor v. Parbhoo and others I L R (1941) All. 843 minority view; Government of Bombay v. Sakur A I R 1947 Born. 38 S B ref.

King Emperor v. U. Damapala I L R 14 Rang. 666 ; Emperor v. Parbhoo and others I L R (1941) All. 843 majority view dissent.

The appellant killed two of his relatives by shooting, at them from the right barrel of his D. B. gun in broad daylight, without any attempt at concealment of his act, without the help of any accomplice and without apparent motive. His history prior to the occurrence established somewhat eccentric behaviour inasmuch as he had allowed his beard and the hair of his head to grow long and he had left his nails uncut. He had been running sugar and cloth depots in the village. A week after the occurrence, he was apparently found to be same by the Magistrate who recorded his confession. He was seemingly also not behaving abnormally when he reached the Dhok of Fazaldad immediately after the shootings and had tea there. He did not raise any objection to his gun and cartridges being taken away by Fazaldad. He himself proceeded to the police station and met the Sub-Inspector.

During his detention period in the Mental Hospital the appellant was suffering from a form of insanity known as manic depressive. This is a functional trouble, the subject of which may think that the world is not fit to live in, he may either kill himself or somebody else, or his family to get himself hanged, or he might kill his family to stop the sufferings of the family due to his inability to earn. Such a person can have lucid intervals. The appellant was suffering from melancholia, a form of manic depressive. The appellant did not talk but under stood what was said to him and the expert opinion was that the appellant's cognitive faculties were not impaired at the time of the incident. A man suffering from manic depressive would be cognizant of the nature and quality of his act and he would also generally know that what he is doing is wrong.

Held that the appellant had failed to substantiate the defence of insanity as required by section 84, Pakistan P. C. The circumstances brought out in defence merely suggest that the moral judgment of the appellant may possibly have been affected by a delusion but no inference arises that any ingre dient of the offence proved is thereby subjected to a doubt.

Kh. Abdur Rahim and Muhammad Ismail Bhatti for Appellant.

Abdul Aziz, Advocate-General for Respondent.

JUDGMENT

RAHMAN, J.-Lal Khan, a pensioner Jemadar aged 35, of village Dhamial, Rawalpindi District, has been convicted of the murder of his brother-in-law and first cousin, Subedar Said Akbar, and of his second cousin, Subedar Dost Muhammad Khan, of the same village, by the learned Sessions Judge, Rawalpindi. He has been sentenced to transportation for life. He appeals and the Crown has also put in a petition praying that the sentence be enhanced to one of death. This revision petition was, however, not pressed on behalf of the Crown after full arguments had been heard in the case.

The incident took place on the 25th of June 1949 at about 5-30 a.m. The facts established by the testimony of P. W. 3 Muhammad Akram P. W. 4 Muhammad Abbas and P. W. 5 Fazal Karim, are that the report of a gun was heard and immediately after, the appellant was seen coming out of the house of Subedar Said Akbar and going towards that of Subedar Dust Muhammad Khan nearby. He then fired at the latter from very close range from in front and killed him at the spot. Said Akbar was found lying dead in his house with a gunshot wound over the left half of the forehead. Apparently, he had also been fired at from close range, as there was charing round the wound. The appellant then walked with his gun to a distance of about a mile to the Dhok of Raja Fazaldad (D. W. 1), called for tea and partook of it. He did not resist when Fazal Dad took possession of his gun and cartridges which he had placed on a cot. The appellant then voluntarily proceeded towards the Thana and actually met the Sub -Inspector just outside the police station when he was starting for the spot. A report had been recorded at the Thana at about 8 a.m. at the instance of Muhammad Akram (P. W. 3), who had gone there immediately after the shootings. The police station in question is four miles from the spot. The gun recovered showed that only the right barrel had been used, the trigger of the left barrel being out of order. This indicates that after shooting Said Akbar dead, the appellant must have re-loaded the right barrel of the gun.

No apparent motive for the appellant's conduct in shoot ing down two of his relatives has been proved. Muhammad Akram (P. W. 3) suggested that the appellant had resented the conduct of Said Akbar, who had received compensation for the land of the appellant acquired by Government for an aerodrome, but had not paid the money to him under the advice of Dost Muhammad Khan. This suggestion however, is belied by the statement of Muhammad Suleman, wasil baqi nawis, Tehsil Rawalpindi (P. W. 6), which makes it clear that Lal Khan had himself received the compensation due to him, long before the incident, on 20th April 1949. The suggested motive, therefore, vanishes. Muhammad Akram and Muhammad Abbas P. Ws. further alleged that they tried to follow the appellant, but he threatened to shoot them down if they approached him. They, therefore, did not interfere with him. Fazal Karim's statement, however, does not bear out this allegation as, according to him, Akram and Abbas, did not go after the accused as this witness advised them to refrain from doing so, on the plea that the appellant might-fire at them. He omits all reference to the alleged threat of shooting held out by the appellant to the witnesses. The appellant must receive the benefit of

doubt arising out of this discrepancy in the evidence and it might, therefore, be assumed that no threat was uttered by the appellant to P. Ws. 3 and 4.

The autopsy on the persons of the two deceased men established that they had died as a result of gunshot wounds, the shots having been fired from close range. The killings were indeed admitted impliedly by the appellant at the trial and the defence of insanity was set up on his behalf.

The appellant, when questioned by the learned Sessions Judge, stated that he did not know whether he had shot and killed Subedar Said Akbar and Subedar Dost Muhammad, but he acknowledged that the witnesses' evidence was to that effect. He had been, during the investigation, produced before Ch. Muhammad Ishaq, Magistrate, 1st Class, with section 30 Powers, Rawalpindi, on the 2nd of July 1949. He had then made a confessional statement in the following terms:-

"I live in village Dhamial for the last 1 years. My health is poor. I have occasionally mental trouble too. My brother-in-law Subedar Said Akbar, who is my next-door neighbour had come on leave for the last 17/18 days. I had been keeping beard and long hair, but I have got them shaved. About 4 or 5 days ago, I got up at the time of morning prayer. I fired with a gun at Subedar Said Akbar and Subedar Dost Muhammad and killed them. After this I gave the gun to a person Fazaldad Khan in the way, and myself went to the Police Station.

The preliminary questions which the learned Magistrate put to the appellant before recording his confession show that at that time at least, the appellant was in full possession of his senses and answered all questions intelligently. When reminded of this confession by the learned Sessions judge, the appellant told him that he could not recall whether he had made such a statement before the Magistrate or not. With regard to the gun, similarly, he could not remember whether he had handed it over to Raja Fazaldad, but added that he might have done so. In defence he examined four witnesses in support of his plea of insanity.

The defence of insanity, in order to succeed. must satisfy the conditions laid down in section 84 of the Pakistan Penal Code. This section reads as follows:-

"Nothing is an offence which is done by a person, who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

It is plain that the material time in this connection is that of the incident itself. The material connection of the appellant at that time can he gathered from the attendant circumstances of the incident, and his previous history and his subsequent conduct can only be drawn upon, as suggesting an inference concerning his mental condition at the time of the act. It is also well-known that a man may be described as insane in medical parlance but that fact by itself could not excuse a criminal act attributed to him unless legal insanity of the character described in section 84, P. P. C. is established.

Muhammad Akram (P. W. 3) denied that the appellant was ill before the occurrence. He is a nephew of Dost Muhammad deceased and for that reason may not have been frank enough to admit facts which might go in favour of the appellant. Muhammad Abbas said nothing in his statement on this question. Fazal Kasim (P. W. 5), who appears to be a disinterested and independent witness, deposed that Lal Khan was not ill in those days but he had allowed the hair of his head to grow long up to his neck, for two or three months prior to the occurrence, although the custom of the locality sanctioned short hair. Some of the defence witnesses, however, have given more details about the behaviour of the appellant prior to the incident. Raja Fazaldad (D. W. 1) stated that the appellant had no quarrel with Subedar Said Akbar who had in fact come home on leave to have Lal Khan treated for his illness. According to him, the appellant

had been invalided from the army three or four years before the occurrence and he had a fit of insanity about 18 months before shootings. He then got better, but six months prior to the murders, the appellant began growing the hair of his head and his beard long and he neglected the cutting of his nails. When asked to attend to them, he would retort that he should not be bothered. The witness admitted that the appellant had a sugar depot and a cloth depot in the village, but he could not say if he ran those depots right up to the time of the murders or not. D. W. 3. Captain Fazal Dad, resident of Chakra, claim ed to be a first cousin of Subedar Said Akbar deceased. If he is to be believed, the appellant used to stay with him every day from 3 to 5 hours from June 1948 to December 1948. He then used to be well dressed and clean. His visits ceased after December 1948. The witness occasionally met him after that in the Jamia Masjid and noticed that he had grown his beard and the hair of his head like faqirs and his nails were uncut. In March 1949 the appellant was brought by his sister (wife of Said Akbar deceased) to the witness's house where they stayed for the night and the witness was given to understand that the appellant was being taken to Peshawar for treatment. The appellant, when invited to take his meal, left it untouched and tied the chapati in a handkerchief in the plate. D. W. 4 Raja Hukamdad Khan is the son of Raja Fazaldad (D. W. 1). He stated that he had once taken Dr. Alvi to Dhamial to see the appellant who was unwell. The doctor's advice was that he should be sent to the Mental Hospital, Lahore.

At the trial, the appellant displayed symptoms which necessitated his transfer to the Mental Hospital, Lahore. In August 1949, the appellant had been kept under observation for more than ten days by Major Dr. Muhammad Abdullah, retired Superintendent of the Mental Hospital, Lahore, and on the 22nd of August 1949 this doctor reported that he did not appear to be a mental case at that time. Again, from the 28th of November 1949 to the 8th of December 1949, the appellant was kept under observation by Major Abdullah. The only peculiarity which the doctor noticed in him was that of muteness which appeared to him to be inconclusive. He, therefore, suggested that he should be sent to the Punjab Mental Hospital for sustained observation. Apparently, there fore, on or about the 12th of December 1949, the appellant became an inmate of the Mental Hospital, Lahore. On the 12th of January 1951, he was certified to be sane and fit to take his trial. Soon after, however, he had a relapse. He was, therefore, detained till the 17th of July 1951., when he was dis charged as sane. Dr. Ahmad Shafi, Medical Superintendent, Punjab Mental Hospital, Lahore, deposed to this effect as D. W. 2. This Expert stated that during his detention period in the Mental Hospital the appellant was suffering from a form of insanity known as manic depressive. According to him, this is a functional trouble, the subject of which may think that the world is not fit to live in, he may either kill himself or somebody else, or his family to get himself hanged, or he might kill his family to stop the sufferings of the family due to his inability to earn. Such a person can have lucid intervals. As the expert had not been questioned as to the probable mental condition of the appellant at the time of the occurrence in the light of the established facts, we sent for hind questioned him further in this Court. He then explained that the appel lant was suffering from melancholia, while he was in the Mental Hospital, this being a form of manic depressive. Lal Khan did not talk but understood what was said to him and he gave it as his opinion after the proved facts were recited to him, that the appellant's cognitive faculties were not impaired at the time of the incident. In his view, a man suffering from manic depressive would be cognizant of the nature and quality of his act and he would also generally know that what he is doing is wrong. The only exception he admitted was a case where the person concerned may be suffering from a delusion that he was going to die, so that no one would look after his family after his death ; he might then proceed to murder his family and hold his act as justified on moral grounds, though he may still be aware that it would be contrary to law. He further stated that a man suffering from manic depressive would be able to recall acts done, by him in fit of insanity, during the period of lucidity.

The facts that have emerged in this case, therefore, are as follows : The appellant killed two of his relatives by shooting at them from the right barrel of his D. B. gun, in broad day light, without any attempt at concealment of his act, without the help of any accomplice and without apparent motive. His history prior to the occurrence establishes somewhat eccentric behaviour inasmuch as he had allowed his beard and the hair of his head to grow long and he had left his nails uncut. It is difficult to accept the opinion of a layman like D. W. 1. Fazal Dad that he actually had a fit of insanity some 1.8 months or even six months before the incident as he deposed. He had been running sugar and cloth depots in the village. A week after the occurrence, he was apparently found to be sane by the learned Magistrate who recorded his confession. He was seemingly also not behaving abnormally when he reached the Dhok of Fazaldad (D. W. 1) and had tea there. He did not raise any objection to his gun and cartridges being taken away by Fazaldad. He himself proceeded to the police station and me the Sub-Inspector. This suggests that the appellant soon after the occurrence had an idea that his act may be contrary to law. The Sub-Inspector was not asked in cross-examination whether he observed any abnormal features in the behaviuur of the appellant at that time. At the time of the incident, he used the right barrel of the gun twice. Can it be said in these cir cumstances that the appellant has succeeded in establishing his plea of insanity as required by section 84, Pakistan P. C.? It is clear on the testimony of the Expert, Dr. Ahmad Shafi, that his cognitive faculties could not have been paralysed at the time of the shootings. He was, therefore, aware of the nature and quality of his act. There is only a possibility visualized by the doctor that if he was suffering from a delusion of the type mentioned by him, he might have regarded his act as morally justified, though he might be conscious that it was contrary to law. It is argued on behalf of the appellant that the burden of proof resting on the accused in such cases by virtue of section 150 of the Evidence Act, (hereinafter referred to as the Act) is satisfactorily discharged, if the accused succeeds in creating a doubt whether the circumstances, bringing the case within any of the general or special exceptions in the Penal Code, exist or not. On the contrary, the case for the Crown is that it is incumbent on the accused in such cases to establish affirma tively that he was suffering from unsoundness of mind of the character described in section 84 of the Pakistan Penal Code at the time of the act itself. It is plain that on the evidence in this case, it cannot be said that the appellant has established the defence affirmatively. At the most, it can be urged that a doubt has been created whether the special circumstances, which would attract the provisions of section 84, Pakistan P. C., existed in this case or not.

Conflicting views have been expressed on the vexed ques tion of the nature of the burden resting on the accused in such cases. Authorities have been cited at the Bar by learned counsel for the parties in respect of their respective positions. For the view contended for by Mr. Abdur Rahim on behalf of the appel lant, reliance is placed on certain English authorities and on a 'Full Bench judgment of the Rangoon High Court in King Emperor v. U. Damapala I L R 14 Rang. 666, the majority view in the Full Bench case of the Allahabad High Court, Emperor v. Parbhoo and others I L R 1941 All. 843, Pir Hasan Din v. Emperor A I R 1943 Lah. 56, Narayan Raut v. Emperor A I R 1948 Pat. 294 and Holia Budho v. Emperor A I R 1949 Nag. 63. On behalf of the Crown, the learned Advocate -General has taken his stand on the minority view in Parbhoo's case I L R (1941) All. 843, Kazi Bazlur Rahman v. Emperor A I R 1929 Cal. 1, Emperor v. Muzaffar Hussain A I R 1944, Lah. (D. B.) and Government of Bombay v. Sakur A I R 1947 Bom. 38 (S B). The underlying assumption in the authorities supporting the defence contention is that the law prevailing here is not different from the English Law and that an accused person is only required to create a reasonable doubt as to the existence of facts or circumstances which would make the general or special exceptions of the Penal Code applicable to his case. The view that found favour in the authorities cited on behalf of the Crown proceeds on the basis that the English Law is different from that prevail ing in this sub-continent, the latter being governed by a special statute, namely, the Evidence Act. According to this view, the true test is provided by an estimate which a prudent man may make of the evidence for the defence in each case and the mere raising of a reasonable doubt on behalf of the

accused as to the existence of relevant circumstances would not be enough to discharge the burden placed on him by section 1.05 of the Act.

Let us first examine the position under the English Law. The famous answers returned by the Judges to the House of Lords in M' Naghten's case 59 R P 85 have been accepted in England as the foundation for the law applicable in cases of insanity. In the opinion' expressed by Lord Chief Justice Tindal in that case, occurs the following passage :-

"And as these two questions appear to us to be more con veniently answered together, we have to submit out opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be same, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was Lahouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing ; or, if he did know it, that he did not know he was doing what was wrong".

In The King v. Ward (1915) 3 K B 696, the expression "without lawful excuse" occurring in section 58 of the Larceny Act, 1861, fell to be construed. It was held that the onus of proof as to lawful excuse is discharged by an accused person if he proves that the alleged implement of housebreaking found in his possession, though capable of being used for that purpose, is a tool used by him in his trade or calling.

In Woolmington v. The Director of Public Prosecutions (1935) A C 462, it was laid down per Viscount Sankey : "But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt ; he is not bound to satisfy the jury of his innocence". Reference was also made to M' Naghten's case and it was recognised that that was "quite exceptional and that the onus was definitely and exceptionally placed upon the accused to establish the defence of insanity in cases of murder". The following passage from the Lord Chancellor's judgment would be instructive :-

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. * * * * * * * * * * * * * * * * * *

When dealing with a murder case, the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication, For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given (this is a ques tion for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if this explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted"

The next authority to be noticed is Sodeman v. R. (1936) 2 All. E R p. 1138. In that case a Lahourer took a young girl for a ride on his bicycle strangled her, tied her hands behind her back, stuffed some of her clothing into her mouth, and left her for dead The cause of death was suffocation. The defence was that he was insane at the time. It was

held that: "the law with regard to insanity was stated in M'Naghten's case, and there was not to be added to that statement, another rule that where a man knew that he was doing wrong, but was forced to do the act by an irresistible impulse produced by disease, he could rely upon a defence of insanity." It was added that, "the burden in cases in which an accused had to prove insanity might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceed ings".

In Rex v. Cart-Briant (1943) 1 K B 607 the principal was enunciated that where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is proved", the jury should be directed that the burden of proof on the accused is less than that required at the hands of the prosecution in proving the case beyond a reason able doubt, and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish.

Reference was also made to Paragraph 15 of Halsbury's Laws of England, Volume 9, Second Edition, at pages 20 and 21. This lays down that the onus of establishing insanity is on the accused. Expert evidence is not essential, nor is it even essential that affirmative evidence should be given by witnesses called-for the defence. The onus may be discharged by cross-examination of the witnesses called for the prosecu tion.

In Archbold's Criminal Pleading Evidence and Practice, Thirty-First Edition, at page 17, the opinion is expressed that the burden of proof which rests upon the prisoner to establish this defence is not as heavy as that which rests upon the prosecution to establish the facts which they have to prove. "It has not been definitely defined, but it may perhaps be stated as not being higher than the burden which rests on a plaintiff or defendant in civil proceeding". Reference is given to Sodeman's case.

To sum up, then, the English Law appears to contemplate cases of insanity as exceptions to the general rule that it is enough for the prisoner to create a doubt in his favour and in such cases it is insisted that the burden of proof would be similar to that resting on a party in a civil case. Preponder ance of probability would, therefore, be the standard of proof. In respect of other defences, however, the creation of a doubt is apparently regarded as sufficient for the acquittal of the offender.

With the greatest deference it seems to me that the learned judges who decided Damapala's case and the majority of the judges in Parbhoo's case have tried to engraft, on the provisions of the Evidence Act (hereinafter referred to as the Act), the principle of "reasonable doubt" which prevails in English Law, but which does not appear to have been given full effect, in the Act. It is presumed that Sir James Fitzjames Stephen, who drafted the Indian Evidence Act, must have had that principle in mind and, consequently, the Act should be so interpreted as to ensure the enforcement of that rule. The intention of the framers of the Act, however, can best be judged by the language employed, if it is unambiguous, See Maxwell on the Interpretation of Statutes, pp. 3 to 5, 9th Edition. The provisions of the Act on this point are couches in unequivocal and clear language and are not wholly in accord with the position under the English Law. Any argu ment, therefore, based on a presumed intention of the drafts man of the Act would, in my humble judgment, be wholly inapt.

The Evidence Act is a consolidating and repealing measure. Section 2 of the Act, which was repealed by the Repealing Act, I of 1938, expressly provided that from the date of the enforce ment of the Act, all rules of evidence not incorporated in the Act, were to be deemed to have been repealed except for certain savings which are not material for our purpose. The section having achieved its purpose was cut out as "dead wood" by the Repealing Act of 1938. The repeal of section 2, however, does not have the effect of re-enacting the rules which it had repealed. Consequently, it must be held that all rules of evidence which had their origin in the English Common and Statute Law, in Hindu and Muhammadan Laws, or in principles of equity, justice and good

conscience, ceased to have any force after the passing of the Act, unless they were incorporated in the Act itself. Section 105 of the Act enacts that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan P. C, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumst ances. Among the illustrations is the following :-

"A, accused of murder, alleges that, by reason of unsound ness of mind, he did not know the nature of the act.

The burden of proof is on `A'.

The expression "burden of proof" in the context of section 105 clearly does not mean merely the duty of introducing evidence. Section 101 of the Act, inter alia, provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The expression "shall presume" occurring in section 105 has a definite connotation assigned to it by the Act. Section 4 lays down categorically that "whenever it is directed by this Act that the Court shall presume a fact it shall regard such fact as proved, unless and until it is disproved."

Now the "absence of circumstances" is as much a "fact" as their existence-See Monir's Principles and Digest of the Law of Evidence III Edition p. 774 where this proposition is affirmed on the authority of Bentham.

In section 3 of the Act, "fact" is defined as meaning and including :-

(1) anything, state of things, or relation of things capable of being perceived by the senses ; and

(2) any mental condition of which any person is conscious. The expression "facts in issue" are defined in section 3 as meaning and including any fact from which, either by itself or in connection with other' facts, the existence, non-existence, nature of extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Among the illustrations given under this definition it is mentioned that at the trial of a person, the fact in issue may be that A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature.

Section 3 also includes the definitions of "proved", "dis proved" and "not proved" as follows :-

" Proved ".-AA fact is said to be proved when, after considering the matters before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved".-A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so pro bable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved".-A fact is said not to be proved when it is neither proved nor disproved.

The position, therefore, is that the accused person setting up a defence based on a general or special exception has to "disprove" the absence of alleviating circumstances as other wise under the law their absence is to be held as "proved". Although it sounds like placing the burden of proving a negative on the accused, it is really not so. He is in

fact called upon to prove the existence of circumstances that would provide an answer to the prosecution case.

A consideration of these provisions read together makes it clear that the Act departs from the principles of English Law in certain respects. In the first place, all exceptions, whether general or special included in the Penal Code, stand on the same level as regards the burden of proof lying on the accused person, under section 105 of the Act. Under English Law, the defence of insanity seems to have been placed on different footing from that of other defences. The expression "reason able doubt" finds no mention in the Act. Instead we have the criterion of the estimate of probabilities in each case with reference to the subjective conviction of the "prudent man" as regards the proof or disproof of circumstances bringing a case within an exception.

In so far as the burden of proof lying on the prosecution in a criminal case is concerned, I think the position under the Evidence Act is reconciLahle with the rule of "reasonable doubt" prevailing under English Law. A " prudent man " would presumably not regard a case as satisfactorily established by the prosecution, unless it is proved beyond "reasonable doubt". The question of the life and liberty of the subject being involved, every precaution may be expected to be taken by the "prudent man" to ensure that they are not encroached upon unjustly. In cases, therefore, wherein it is only a question whether the offence has been brought home to the accused or not, i.e., the essential facts to prove the ingredients of the crime have been established or not, the role of "reasonable doubt" may well apply: So far there is no difficulty. But the rule does not appear to be of universal application in the context of the Act. Where the facts established, prima facie make out a case justifying the conviction of a person, of an offence, unless certain other facts are proved, bringing the offence within one of the general or special exceptions of the Penal Code, the mere creation of a doubt on the part of the accused as to the existence or otherwise of those special circumstances asserted on his behalf would not suffice. In such a contingency, the necessary facts could be said to be neither "proved" nor "disproved", and hence they would fall within the definition of "not proved" given in the Act. In view of the clear language of section 105, it would be anomalous to hold that, although the exceptional circumstances were not proved, yet the accused was entitled to have the benefit of a doubt arising on the whole case. This would imply the con tradictory finding that certain circumstances were " not proved" and yet their existence should in some sense be regarded as sufficiently probable to extend their benefit to the accused person. The test in such cases would be the probability or otherwise of the existence or otherwise of the relevant circumstances. Of course there may be cases in which the defence taken may cast a doubt on the existence of the requisite intention of mens rea which proves a necessary ingredient of the offence. In such cases it is conceivable that the accused may succeed in securing an acquittal on the strength of a reasonable doubt created on that point. But where tire circumstances of the defence plea do not affect the ingredients of the offence established by the prosecution evidence e.g., where the right of private defence or circums tances of grave and sudden provocation are pleaded, no such question can possibly arise and the accused must "prove" his defence plea within the meaning of the Act.

The standard of proof required of an accused person may however, not be the same as would rest ordinarily on the prosecution in all criminal cases. This is so, not because the Act provides for different standards of judgment in so many words, but because the proof is made to depend upon the subjective conviction of the "prudent man". Such a conviction would be conditioned by the circumstances of each individual case. The standard of proof 'would, therefore, vary, but could not be held that a fact must be held to be "proved" although a doubt exists as to its existence or otherwise. Such a view would be unsustainable having regard to the definitions of "proved", "disproved" and "not proved" in the Act.

I find myself. therefore, in respectful agreement with the minority view of the Allahabad High Court in Parbhoo's case and with the view taken by the Special Bench of the Bombay High Court in Sakur's case and would hold that the suggestion of a mere reasonable possibility of the existence of exceptional circumstances would not exonerate the accused in all cases. On the other hand, circumstances should be "proved" in the sense of that word as defined in the Act, with reference to the opinion of the "prudent man" and the rule of reasonable doubt can be successfully invoked in a certain category of cases only. Reviewing the facts of the present case in the light of the above discussion, I have reached the conclusion that the appellant has failed to substantiate the defence of insanity as required by section 84, Pakistan P. C. The circumstances brought out in defence merely suggest that the moral judgment of the appellant may possibly have been affected by a delusion but no inference arises that any ingredient of the offence proved is thereby subjected to a doubt. I would, therefore, uphold his conviction and sentence and dismiss his appeal. The revision petition should also be dismissed.

MUHAMMAD MUNIR, C. J.-For reasons to be recorded at a later date I agree with my brother Rahman that the burden of proving unsoundness of mind of the kind defined in section 84 of the Penal Code, which lay on the appellant has not been discharged and that, therefore, this appeal must be dismissed.

MUHAMMAD MUNIR, C. J.-I have arrived at the same result as my brother Rahman on this important point.

No rule is more firmly established or widely recognised in criminal law than the principle that in a criminal case persuasion of guilt must amount to such a moral certainty as convinces the mind of the tribunal as reasonable men beyond all reasonable doubt and that where there is reasonable doubt as to the guilt of the accused, the benefit of it must be given to him. The rule is founded on grounds of public policy, for the consequences of an erroneous conviction are much more serious both to the accused and society than the consequences of an erroneous acquittal. " It is better", said Holroyd, J., in Sarah Hobson's case, I Lewin's Crown Case 261 "that ten guilty men should escape than that one innocent man should suffer.

The above rule is not expressly enacted by the Indian Evidence Act but the combined effect of the various provisions of that Act leads precisely to the same result. By section 101 of that Act whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The first illustra tion to that section states that if A desires a Court to give judgment that B shall be punished for a crime which A says B has committed, A must prove that B has committed the crime. By section 3 a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Therefore, where a prisoner is accused of having committed a particular offence, the burden of proving that he has committed that offence and is liable to be punished for it, is on the prosecutor. Now, the liability to be punished is made by the substantive law dependent on the existence of certain facts which that law, whether it be common law or statute law, defines. These facts are the elements or ingredients of the offence and it is the duty of the prosecutor to prove each of theca with the degree of certainty which is prescribed by section 3, that is to say, the Court which has to determine whether those facts are proved or not must, after considering the matters 'before it, either believe that those facts exist or must consider their existence so probable that, like a prudent man, under the circumstances of the particular case it ought to act upon the supposition that they exist. Thus to explain the point, if the prosecutor asks the Court to sentence a man to death on the ground that he has been guilty of murder, the prosecutor must prove that the accused did an act which caused death and that he did

that act with such intention or knowledge as is mentioned in sections 499. and 300 of the Penal Code, which define the offence of murder. Or, if the prosecutor requires the Court to convict and sentence a man under section 411 of the Penal Code, he must prove that the accused dishonestly received or retained some stolen property, either knowing it to be stolen or having reasons to believe it to be stolen. Now, because every offence is composed of certain ingredients, it is necessary that each of these ingredients must be proved with the degree of certainty required by section 3. If only some of the ingredients of the offence are proved while others remain unproved, it follows that the offence cannot be said to have been proved and the liability to be punished for that offence cannot be enforced by the Court. The result, therefore, is that if any one of the ingredients of the offence charged is not proved beyond reason able doubt, the benefit of that doubt must be given to the accused and the issue of guilt must be held unproved. If this principle is borne in mind, much of the apparent conflict between some English decisions and the provisions of our Evidence Act would disappear. Thus, to take the leading English case of Woolmington v. Director of Public Prosecutions, 1935 A C 462, the charge against the prisoner in that case was that he had been guilty of murder in causing the death of a woman. The defence of the prisoner was that the death charged as murder was due to the accidental explosion of a gun which he had in his hand. To find a person guilty of murder in English common law it is necessary to find not only that the prisoner caused the death but also that the killing was malicious. It is, however, not necessary that there should be independent proof of malice, for malice may be presumed if the death was the result of a conscious act of the prisoner. The position is very much the same as under our criminal law, according to which, in order to punish a man for murder the Court must find not only that the death of the deceased person was the result of an act done by the prisoner but also that the act which caused death was done with a certain intention or knowledge. The prisoner in Woolmington's case was pleading an accident and, therefore, if he had succeeded in showing that there was a reasonable possibility of the gun having exploded accidentally, proof of one of the ingredients of the offence of murder, namely, malice, would have been rendered doubtful, and that doubt would have effected the whole case by making the general issue of the guilt of the prisoner doubtful. But in his charge, the trial judge, Swift, J., had directed the jury to find the prisoner guilty of murder if they came to the conclu sion that the deceased woman died in consequence of injuries from the gun which the prisoner was carrying unless the prisoner satisfactorily proved that the explosion was accidental. This, as was pointed out by Lord Chancellor, Viscount Sankey, in his speech to the House of Lords, was tantamount to requiring the prisoner to prove his innocence which had never been the rule in English common law. " When dealing with a murder case", said the Lord Chancellor, "the Crown must prove (a) death as the result of a voluntary act of the accused (b) malice of the accused. It may prove malice either expressly or by implication. For malice. may be implied where death occurs as the result of a voluntary act of the accused which is (i) intentional and (ii) unprovoked. When evidence of death and malice has been given, the accused is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence are left in reasonable doubt whether, even if, his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted." That case cannot, therefore, is taken to be an authority for the proposition that where an accused person relies on an excep tion which causes what would otherwise be murder to cease to be murder, it is sufficient for the prisoner to show that on the facts the application of the exception to the case is doubtful. Woolmington's case is relevant in this country only to such cases as came up before this Court in Hasan Din v. Emperors A I R 1943 Lah. 56, and Muhammad Sadiq v. The Crown A I R 1949 Lah. 85. The observations in the earlier case relating to the discharge of burden of proof where it lies on an accused person are somewhat too general, but they were intended to be applicable to cases where the issue is whether the firing which resulted in death was intentional or accidental. Dealing with the burden of proof as to this issue, I said :-

"In the present case it is admitted that the accused and the deceased were apparently on friendly terms with each other. This fact alone makes the theory of accident as likely as, if not more likely than, the theory that the accused fired the pistol intentionally and no Court can convict an accused person on circumstantial evidence where the theory of his innocence is likely as that of his guilt. We have made these remarks about the doctrine of burden of proof in such cases not because they are necessary for the decision of this case but because of the view of this matter taken by the learned Sessions judge and what we have said should not be taken to mean that the present case does actually fall within the terms of section 80, Penal Code."

The point was cleared in the 1949 Lahore case where I said :-

"In the language of section 300, Penal Code, the prosecu tion must prove that the act by which death is caused was done with a certain intention or knowledge. As long as the prosecution does not prove such intention or knowledge, the accused is entitled to acquittal, and there no onus on him to take or prove any special plea of accident or necessity. Where, as in the offence of murder, intent or knowledge is an ingredient of a crime, there is no onus on the accused to prove that the act was accidental. And where death is caused by injuries from afire-arm the prosecution has to show not only that the firing was intentional or voluntary but also that the firing was prompted by any such intention or knowledge as is mentioned in section 300, Penal Code. If either of these ingredients is not proved, the offence committed is not murder whatever else it may be. In a trial for murder by a fire-arm the first question is whether the firing was intentional, and on this issue the accused is under no obligation to prove that the firing was not intentional but only accidental, the initial onus of proving the intent being always on the prosecution. If considering every relevant fact the theory of accidental explosion remains as likely as that of intentional firing or even reasonably possible the accused must be acquitted on the ground that the prosecu tion has failed to prove one of the essential ingredients of the offence of murder. In such a case, it is wholly incorrect to say that the burden of proof that the firing was accidental is, by reason of section 105, Evidence Act, or on some general principle, on the accused, and that the accused must take a special plea to that effect and prove it in the same manner as the prosecution is required to prove a fact."

The principle underlying the decision in the 1949 case precisely the same as that on which the decision in Wool mington's case proceeded and neither of these authorities recognises the principle that where an accused person relies on an exception he is entitled to the benefit of doubt as to the applicability of that exception. In fact, it was recognised in Woolmington's case that in cases of insanity the onus is definitely and exceptionally upon the accused and that the principle enunciated by the House of Lords was "subject also to any statutory exception."

The position in the subsequent English cases of Carr -Briant, (1943) 29 Cr. App. R. 76, and Ward's Case, 11 Cr. App. R. 245 was the same. In the former, which was a case under section 2 of the Prevention of Corruption Act, 1906, it was held by Mr. Justice Humphreys, with whom the Lord Chief Justice and Mr. Justice Lewis agreed, that where, either by statute or at common law, some matter is presumed against an accused person, unless the contrary is proved, the jury should be directed that it is for them to decide whether the contrary is proved ; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt ; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish. Under the statute under which that case was decided, it was an offence to give or receive corrupt consideration, and the statute provided that where it was proved that any considera tion had been given under given circumstances, "the considera tion shall be deemed to have been given corruptly as such inducement or reward as is mentioned in the Act, unless the contrary is proved". The essential point to remember about this case is that under

the statute the burden of proving that consideration was given corruptly and as an inducement or reward was on the prosecution but that the statute directed the Court to presume that if the receipt of any consideration under certain circumstances was proved, the consideration was given corruptly and as an inducement or reward unless the accused proved to the contrary. Thus the fact that the consideration was given corruptly and as an inducement or reward was an ingredient of the offence which had to be proved by the prosecution though in certain circumstances stated in the statute proof of that ingredient could be dis pensed with if the accused did not give evidence to prove that the receipt or the giving of the consideration was not from a corrupt motive. If, therefore, the accused produced such evidence as raised a reasonable doubt about the consideration being corrupt, then the doubt being as to one of the ingredients of the offence rendered doubtful the whole case, the burden of proving which lay on the prosecution. Ward's case, 11 Cr. App. R. 245, which was a case under the Larceny Act, 1861, proceeded on the same principle. Section 53 of that Act declared a person to be guilty of mis-demeanour if he was found by right having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any imple ment of house-breaking. The appellant who was convicted under the Act was found in possession of certain tools which were bricklayer's tools but fell within the statutory definition of implements of housebreaking. The appellant himself was a bricklayer by profession and the question was whether the jury were rightly directed when they were told that the burden was still on the appellant of proving that he had no intention of using the tools for felonious purposes. The Lord Chief Justice held the direction to be wrong and remarked that the case should have been left to the jury on a direction that prima facie a sufficient excuse had been shown, but that they must consider the other circumstances. Here again it is important to note that under the statute the liability to be punished depended on being found in possession of implements of housebreaking without lawful excuse and that burden of proof of lawful excuse rested on the accused. If, therefore, the accused gave prima facie proof of lawful excuse, one of the essentials of the offence was left open to doubt and it could not be said that the prosecution had proved the case against him beyond reasonable doubt. There is a large number of cases, both Indian and English, where it has been held that where the charge against an accused person is that of being in possession of stolen property knowing it to be stolen, it is not necessary that the accused should positively prove his innocent possession. In such cases, the burden of proving that the accused knew that the property was stolen is on the prosecu tion though by Illustration (a) to section 114 of the Evidence Act, the Court is permitted to presume that a person who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. Since the burden of proving guilty knowledge in such cases is on the prosecution, it is sufficient for the accused to give such explanation of his possession as is sufficient to cast a doubt on the question whether he was or was not in possession of the goods knowing them to be stolen. Guilty knowledge is an ingredient of the offence and, therefore, any doubt as to this ingredient must make the guilt of the prisoner doubtful and thus entitle him to an acquittal.

The principle of Woolmington's case was applied in India to the proof of general exceptions mentioned in Chapter IV of the Penal Code and of any special exception or proviso contained in any part of that Code or in any law defining an offence. Thus, in King Emperor v. U. Damapala I L R 14 Rang. 666, a Full Bench of the Rangoon High Court regarded the decision in Woolmington's case as of binding authority in interpreting the terms of section 105 of the Evidence Act and after discussing the principle of that case arrived at the result that where an accused person, who is being tried for murder, relies on the exception relating to the right of private defence, it is not necessary for him to prove beyond all reasonable doubt that the case comes within the exception, and that it is sufficient if he establishes a reasonable doubt in the case for the prosecution. The point was subsequently the subject matter of a reference in the Allahabad High Court to a Full Bench of seven judges in Emperor v. Parbhoo I L R (L941) All. 843. The exception relied on by the accused in that case also was that of the right of self-defence, and four of the judges held that having regard to section 96 of

the Penal Code and section 105 of the Evidence Act, in a case in which the right of private defence, or any other general exception in the Penal Code, is pleaded by an accused person and evidence is adduced to support such plea, but such evidence fails to satisfy the Court affirmatively of the existence of circumstances bringing the case within the general exception pleaded, the accused is entitled to be acquitted if, upon a consideration of the evidence as a whole (including the evidence given in support of the plea of the said general exception) a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to the benefit of the said exception, The other three Judges dissented from this view and held that the burden of proving the exception relied on is on the accused person and that it is not sufficient for him merely to create a doubt whether the exception does or does not apply.

The question also came up before a Special Bench of the Bombay High Court in Government of Bombay v. Sakur A I R 1947 Bom. 38. The learned judges in that case not only distinguished Woolmington's case from cases where an accused person in this country relies on an exception relating to self- defence but also ruled that the law in this country is different from the English Law and that the burden of proving an exception rests on the accused person who has to prove it to the satisfaction of the prudent man of section 3 of the Evidence Act. In the Lahore High Court the only case relating to proof of the exception relating to the right of self-defence is Emperor v. Muzaffar Hussain A I R 1944 Lah. 97, wherein it was recog nised that the burden of proof is on the accused and that he must discharge this burden by establishing his plea or at least by making it out prima facie.

In my opinion, there can be no doubt as to what the law here is in such cases. The Evidence Act directs as unequi vocally as any statute could that when a person is accused of any offence, the burden of proving the existence of circum stances bringing the case within any of the general exceptions in the Penal Code or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. Section 4 of the Act enacts that whenever it is provided by this Act that the Court shad presume a fact, it shall regard such fact as proved unless and until it is disproved. The combined result of the operation of these two provisions is that the Court shall regard as proves; the absence of the circumstances which bring the case of an accused person within any of the exceptions mentioned, and. it will be for the accused person to prove that his case does come within the exception pleaded. This means that the evidence of matters on which the accused relies in proof of the exception must be such as can induce the Court to believe, that the facts which would make the exception applicable exist or that their existence is so probable that the Court, like a prudent man, under the circumstances of the particular case ought to act upon the supposition that they exist. What is necessary to bear in mind is that the degree of probability required is such as a prudent man would require in the circum, stances of the particular case to act upon the supposition of the existence of those facts. What is the standard of a prudent man, the Act does not define but surely the Court, that is called to give a decision in a criminal case knows how important it is to society that a person is not wrongly convict ed. It will, therefore, when the burden of proof is on the prose cution, insist on such evidence as proved each ingredient be the of the offence charged beyond all reasonable doubt, and if that standard of a prudent man, it follows that where the accused succeeds in creating a doubt as to the existence of any ingredient of the offence, the prudent man will give him the benefit of that doubt. The English cases, to which reference has already been made above, were all cases in which the judge directing the jury was held to have misdirected the jury is telling them that where a fact, which is a necessary ingredient of the offence charged, is presumed in favour of the prosecution, it is for the accused person affirmatively to displace that presumption. It is obvious that if the presumption in favour of the prosecution relates to an ingredient of the offence charged, and the evidence produced by the accused falls short of definitely disproving that presumption and merely makes it doubtful whether the fact, about which the presumption is raised, did or did not exist, the doubt so

created affects the general issue of the guilt of the accused and the prosecution, on whom the onus is to prove its case beyond all reasonable doubt, cannot be said to have discharged that onus. Or, what comes to the same thing, the prosecution cannot in such a case be considered to have succeeded in discharging the major onus that lies on it to establish beyond reasonable doubt every ingredient of the offence if the evidence produced by it or the presumption as to the existence of a fact to which by statute or common law it is entitled, is rendered doubtful by the accused giving evidence to the contrary. The position, however, is different where the accused is required by statute not to disprove a fact which is an ingredient of the offence and which the statute presumes against him but to prove something which is independent of the main definition of the offence and which by reason of special statutory provision would make him cease to be liable for that offence. Thus, where a man is accused of murder, all that the prosecution are required to prove is that the accused did an act which caused death and that that act was done with the intention or knowledge stated in the section which define the offence of murder. If the case for the accused be that he acted under grave and sudden provocation or that he acted in exercise of the right of self-defence, the evidence given by him will not relate or be referable, to any of the facts which an ingredient of the offence but it will relate to some other facts which are no part of the definition of murder. In the same way, if the killing and the requisite intention or knowledge are proved or admitted, but the plea taken is that of insanity, the evidence in proof of the plea will not be directed against any ingredient of the offence of murder but will seek to establish that some other independent fact which is not a part of the offence of murder existed which made the act, which was prima facie murder, cease to be murder. It is this principle on which the English cases and the provisions of our Evidence Act can be reconciled and which appears to me to be a correct deduction from the general principle and the relevant pro visions of the Evidence Act. That being the position, the Court will have to see in each particular case whether the doubt created by the evidence produced by the accused is confined to something special pleaded by him or whether the doubt also extends to a necessary ingredient of the offence charged. As I have already pointed out, a prima facie proof of accident will be sufficient to entitle the accused to an acquittal on the charge of murder because ex-hypothesi such prima facie evidence makes the evidence relating to intention and know ledge which is an ingredient of the offence of murder doubtful. This, however, is not the case where grave and sudden provo cation or the right of private defence is relied on by the accused in order to show that what is otherwise murder is riot so be cause of the existence of certain other facts which do not enter into the definition of the offence of murder. In the case of such exceptions, I am of the view that evidence produced by the defence which merely throws a doubt on the applicability or otherwise of the exception will not be sufficient to discharge the onus that lies on the accused to prove that his case comes within the exception. A contrary view would have the effect of requiring the prosecution to `disprove the exception, which is plainly opposed to the terms of section 105 of the Evidence Act. This result might at first sight appear to conflict with Woolmington's case in one particular inasmuch as that case appears to suggest that prima facie proof of provocation may be sufficient to reduce the offence of murder to manslaughter but there is an obvious explanation for it. In the common law definition of murder, malice, as already pointed out, is a necessary ingredient and the presumption of malice in that law may be displaced by proof of provocation. Such proof may, therefore, be sufficient to cast a doubt on a necessary ingredient of the offence of murder.

In this view of the matter, it appears to me that the Rangoon High Court and the majority in the Full Bench case of Allahabad did not lay down the law correctly, and I am more inclined to agree with the view of the minority in the Allahabad case and the view of the Special Bench in the Bombay case reported as Government of Bombay v. Sakur A I R 1947 Bom. 38.

In the present case, the plea taken is that of insanity. The killing is admitted. By section 84 of the Penal Code, nothing is an offence which is done by a person who, at the time

of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The burden of proof that the appellant was of unsound mind and for that reason was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law, lies on him. It has been held in several cases in India, a typical case being Tola Ram v. The Crown I L R 8 Lah. 684 that where an accused person pleads insanity, it is for him affirmatively to prove all the ingredients of the exception on which he relies. This decision proceeds on M' Nagten's case which was recognised by the House of Lords in Woolmington's case as placing the onus of proving insanity on the prisoner. In a subsequent Privy Council case, however, namely, Sodeman's case, (1936) 2 All. E R 1138, Viscount Hailsham, Lord Chancellor, observed that there was no doubt that the burden of proving insanity was not higher than the burden which rests upon a plaintiff or a defendant in civil proceedings, and that it was definitely less than that which rests on the prosecution to prove its case. By illustration (a) to section 105 of the Evidence Act, the burden of proof is on the accused to prove that his case comes within the exception in section 84 of the Penal Code. Since intention or knowledge is a necessary ingredient of the offence of murder as defined by sections 299 and 300 of the Penal Code, if the evidence relating to insanity is sufficient to cast a doubt on the - question whether the act of the accused, which is alleged to be murder by the prosecution, was or was not done with the intention or knowledge mentioned in section 300 of the Penal Code, the case will fall within the category of those cases of which Woolmington's, case is the leading example, and the accused will be entitled to the benefit of that doubt because the doubt relates to an ingredient of the q9ence charged. In the present case, however, the act is that of shooting and it is not suggested that the appellant had no intention to kill. The offence of murder is, therefore, complete unless the accused satisfies the Court that in the particular circumstances of the case the evidence presents such degree of probability as is sufficient to induce the Court that like a prudent man it ought to act upon the supposition that the accused by reason of unsoundness of mind was incapable of knowing the nature of, the act or that he was doing what was either wrong or contrary to law. For the reasons given by my brother, I agree that the evidence is wholly insufficient to create that degree of probability and that, therefore, this appeal must be disallowed.

A. H. Appeal dismissed.

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